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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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kuhlke

Mailed: March 31, 2005

Opposition No. 91156211

Hancor, Inc.

v.

Mollewood Export, Inc.

Before Hohein, Bucher and Chapman, Administrative Trademark Judges.

By the Board:

This case now comes before the Board for consideration of applicant's motion (filed November 11, 2004) for summary judgment on the issue of likelihood of confusion under Section 2(d) of the Trademark Act. The motion has been fully briefed.<sup>1</sup>

**BACKGROUND/PLEADINGS**

Applicant has filed an application for registration of the mark SURE-LOK (in typed form) for "collapsible containers made from processed wood materials utilizing a

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<sup>1</sup> The Board has exercised its discretion and has considered applicant's reply brief filed on December 17, 2004. Trademark Rule 2.127(e).

metal clip for use in the automotive parts industry" in Class 20.<sup>2</sup>

In its notice of opposition, opposer alleges, inter alia, that: opposer "has been, and is now, using the mark SURE-LOK throughout the United States...in connection with the sale of plastic corrugated pipe and tubing with integral coupling means for use in drainage systems, storm sewers and sanitary sewers"; opposer's piping products are "sold to customers in the construction, building, agricultural, recreational, residential and specialty markets"; opposer distributes molded HDPE reusable tanks and containers, manufactured by a third party; "applicant's products are used in the same market as opposer's products"; and because of the "identical nature of the respective marks and the related nature of the goods and/or services of the respective parties" applicant's mark is "likely to cause confusion, or to cause mistake, or to deceive."

Opposer pleaded ownership of the following registration: SURE-LOK for "plastic corrugated pipe and tubing with smooth interior using an integral bell coupler

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<sup>2</sup> Application Serial No. 76376791 filed on February 28, 2002, claiming July 18, 2001 as the date of first use and first use in commerce.

for drainage systems, storm sewers, and sanitary sewers" in International Class 17.<sup>3</sup>

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

**SUMMARY JUDGMENT STANDARD**

Generally, summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is material when its resolution would affect the outcome of the proceeding under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, a dispute over a fact which would not alter the Board's decision on the legal issue will not prevent entry of summary judgment. *See, for example, Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.3d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). A fact is genuinely in dispute if the evidence of record is such that a reasonable fact finder could return a verdict in favor of the nonmoving party. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993). The nonmoving party must be given the benefit of all reasonable doubt as

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<sup>3</sup> Registration No. 1940853, issued on December 12, 1995, filed on October 26, 1994, Section 8 affidavit accepted, Section 15 affidavit acknowledged, and claiming first use and first use in commerce on May 19, 1994.

to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

**THE PARTIES' EVIDENCE AND ARGUMENTS**

Applicant's evidence on summary judgment includes: (1) opposer's responses to applicant's first requests for admission; (2) opposer's responses to applicant's interrogatory Nos. 3, 6 and 14; (3) opposer's produced documents, specifically, excerpts from opposer's 2003 product catalogs; and (4) the affidavit of Christopher J. Fildes, applicant's outside counsel, together with the exhibits identified therein. The exhibits include printouts of opposer's and a third party's web pages.

In response, opposer has submitted: (1) a copy of opposer's Registration No. 1940853; (2) opposer's responses to applicant's interrogatory Nos. 23, 24 and 25; (3) opposer's responses to applicant's second set of document requests; (4) the declaration of William E. Altermatt, opposer's vice president of marketing; and (5) applicant's responses to opposer's first set of interrogatories.

Applicant argues that, in this case, the dissimilarity of the goods is dispositive. Applicant states that opposer, in response to a request for admission, has admitted that it does not use the mark SURE-LOK on collapsible wooden crates and, in response to an interrogatory, has stated that it has not yet considered expanding the products it sells in connection with its SURE-LOK mark. Therefore, applicant asserts, the goods and the nature of the goods sold in connection with the parties' marks are undisputed.

Applicant contends that the goods recited in its application are clearly distinct from the goods recited in opposer's registration and the septic and water storage tanks opposer allegedly distributes. Applicant explains that its containers made of processed wood materials are used to contain and transport items when in use and are collapsible for ease of storage when not in use, as distinguished from opposer's corrugated pipe and tubing, which is used as a conduit for "liquids in drainage systems as well as storm and sanitary sewers." Further, applicant describes its trade channels as the "packaging and shipping markets" which are different from opposer's self-described construction, building, agricultural, recreational, residential, and specialty markets. Applicant concludes that the parties' goods are so vastly different that as a

matter of law, on this basis alone, there cannot be a likelihood of confusion.

Opposer, in response, states that the parties' marks are identical in all respects; they are spelled exactly the same, hyphenated the same, and contain no design aspect that differentiates the marks. Further, opposer states that the parties' goods are similar "in that they utilize a unique releasable structure to join two pieces of the product" and this "unique latching feature associated with each company's product weighs in favor of denying [applicant's] registration." With regard to channels of trade, opposer argues that "it is viable that one of [opposer's] competitors could use [applicant's] shipping containers to ship plastic pipe and accessories."

Further, opposer argues that its mark is famous, noting that opposer sold, in the last year alone, approximately \$100,000,000 worth of product in connection with its SURE-LOK mark and has spent on average \$1,000,000 a year to advertise and market the SURE-LOK product. Opposer argues that the lack of any actual confusion is the result of the "minimal amount of money spent by [applicant] to promote its products and the relatively short period of time during which there has been concurrent use."

**ANAYLSIS**

In determining whether there is any genuine issue of material fact relating to the legal question of likelihood of confusion, the Board must consider all of the probative facts in evidence which are relevant to the factors bearing on likelihood of confusion, as identified in *In re E.I du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See *Sweats Fashions v. Panhill Knitting Co.*, 833 F.2d 1560, 4 USP2d 1793, 1797 (Fed. Cir. 1987). As noted in the *du Pont* decision itself, various factors, from case to case, may play a dominant role. *Id.*, 476 F.2d at 1361, 177 USPQ at 567. Further, a single *du Pont* factor may be dispositive in certain cases. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (marks dissimilar); *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 USPQ 151 (TTAB 1983), *aff'd*, 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984) (goods dissimilar).

The key likelihood of confusion factor in this case is the dissimilarity between the parties' goods as identified in their respective registration and application, and as attested to in the notice of opposition and opposer's responses to applicant's discovery requests.

The evidence of record clearly establishes that there is no genuine issue of material fact that the parties' respective goods are not related. Opposer uses the mark in

connection with plastic piping and tubing with an integral bell coupler for drainage systems, storm sewers and sanitary sewers, in contrast to applicant's collapsible wooden containers utilizing a metal clip for use in the automotive parts industry. There is no evidence in the record before us to rebut the obvious dissimilarity of the parties' goods. The only thing offered by opposer is a statement that both parties' products use a "unique latching feature." This could be said for a glass jar and a screen door; it is not sufficient to raise a genuine issue of material fact. Moreover, opposer's argument that there is a "viable" relationship between the parties' goods because the channels of trade could overlap if a competitor's piping were shipped in applicant's containers is not well taken; particularly, in view of the fact that the identification of goods in the application specifically limits applicant's goods to use in the automotive parts industry. The Board cannot imagine, nor has opposer come forward with any evidence or argument, that the building and construction markets overlap with packing and shipping of automotive parts industry.

For purposes of determining applicant's motion for summary judgment, we view all other *du Pont* factors, including the fame of opposer's mark,<sup>4</sup> in opposer's favor,

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<sup>4</sup> The Board notes, however, that even though, as opposer asserts, its mark is famous, opposer's emphasis of the "unique latching feature" in the description of the goods in its brief reveals the



but we find that the dissimilarity of the goods is so vast as to preclude a likelihood of confusion. Therefore, we find that no genuine issue of material fact remains for trial on the issue of likelihood of confusion, and that applicant is entitled to judgment as a matter of law.

In view of the above, applicant's motion for summary judgment on the issue of likelihood of confusion under Section 2(d) of the Trademark Act is granted, judgment is entered in favor of applicant and the opposition is dismissed.

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suggestive nature of the mark SURE-LOK. *See In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992) (highly suggestive nature of term GRAND PRIX affords mark narrower scope of protection; therefore, well known use on automobiles and use on automotive replacement parts not likely to cause confusion.)